86-315

Supreme Court, U.S.
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No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1985

JAMES R. RICKETTS, Director of the Arizona Department of Corrections; DONALD WAWRZASEK, Superintendent of the Arizona State Prison; and ROBERT K. CORBIN, Attorney General of Arizona,

Petitioners,

vs.

RANDY GREENAWALT,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

I. DID THE COURT OF APPEALS ERR IN REMANDING THIS CASE TO BE CONSIDERED IN LIGHT OF EDWARDS V. ARIZONA, 451 U.S. 477 (1981), WHEN THE RECORD MAKES CLEAR THAT DEFENDANT GREENAWALT WAS NEVER SUBJECTED TO "INTERROGATION" AS DEFINED BY RHODE ISLAND V. INNIS, 446 U.S. 291 (1980), AND EDWARDS ONLY PROHIBITS THE INITIATION BY POLICE OF "INTERROGATION" AFTER INVOCATION OF THE RIGHT TO COUNSEL?

II. DID NOT THE COURT OF APPEALS ERR IN REMANDING THIS CASE TO BE CONSIDERED IN LIGHT OF EDWARDS V. ARIZONA, SUPRA, BECAUSE DEFENDANT GREENAWALT HAD ACTUALLY CONSULTED WITH A LAWYER BETWEEN THE TIME HE INVOKED HIS RIGHT TO COUNSEL AND THE TIME THE POLICE INQUIRED ABOUT GREENAWALT'S WILLINGNESS TO BE QUESTIONED, SO THAT EDWARDS' REQUIREMENT OF AN OPPORTUNITY TO CONSULT WITH COUNSEL BEFORE INTERROGATION IS RENEWED HAD BEEN FULLY SATISFIED?

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OPINIONS BELOW

Respondent's convictions were first reviewed by the Arizona Supreme Court in State v. Greenawalt, 128 Ariz. 150, 624 P.2d 828 (1981), cert. denied, 454 U.S. 882. They were reviewed again when he filed a petition for post-conviction relief, but the denials of relief by both the trial court and the Arizona Supreme Court were by simple orders, without opinions. His petition for federal habeas corpus was denied in a lengthy but unpublished Memorandum Opinion and Order. The decision for which certiorari is sought is a published opinion, Greenawalt v. Ricketts, 784 F.2d 1453 (9th Cir. 1986), reproduced as Appendix 1 to this Petition.

JURISDICTION OF THIS COURT

A three-judge panel of the Ninth Circuit Court of Appeals filed its Opinion, reversing and remanding the District Court's denial of a petition for habeas corpus relief, on March 20, 1986. A Petition for Rehearing and request for rehearing en banc

was timely filed by mailing it on April 4, 1986. The Petition for Rehearing was denied by an Order filed May 20, 1986, no judge having requested a vote on the suggested rehearing en banc. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

AMENDMENT V.

No person ... shall be compelled in any criminal case to be a witness against himself ... .

AMENDMENT VI.

In all criminal prosecutions, the accused shall ... have the Assistance of Counsel for his defense.

AMENDMENT XIV.

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

28 U.S.C. § 2254.

State custody; remedies in Federal courts

(a) The Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States.

* * *

(d) In any proceeding instituted in a Federal court by an application for a writ

of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination after a hearing on the merits of a factual issue, made by a State court of competent jurisdiction in a proceeding to which the applicant for the writ and the State or an officer or agent thereof were parties, evidenced by a written finding, written opinion, or other reliable and adequate written indicia, shall be presumed to be correct, unless the applicant shall establish or it shall otherwise appear, or the respondent shall admit --

> (1) that the merits of the factual dispute were not resolved in the State Court hearing;
>
> (2) that the factfinding procedure employed by the state court was not adequate to afford a full and fair hearing;
>
> (3) that the material facts were not adequately developed at the State court hearing;
>
> (4) that the State court lacked jurisdiction of the subject matter or over the person of the applicant in the State court proceeding;
>
> (5) that the applicant was an indigent and the State court, in deprivation of his constitutional right, failed to appoint counsel to represent him in the State court proceeding;
>
> (6) that the applicant did not receive a full,

fair, and adequate hearing in the State court proceeding; or

(7) that the applicant was otherwise denied due process of law in the State court proceeding;

(8) or unless that part of the record of the State court proceeding in which the determination of such factual issue was made, pertinent to a determination of the sufficiency of the evidence to support such factual determination, is produced as provided for hereinafter, and the Federal court on a consideration of such part of the record as a whole concludes that such factual determination is not fairly supported by the record:

And in an evidentiary hearing in the proceeding in the Federal court, when due proof of such factual determination has been made, unless the existence of one or more of the circumstances respectively set forth in paragraphs numbered (1) to (7), inclusive, is shown by the applicant, otherwise appears, or is admitted by the respondent, or unless the court concludes pursuant to the provisions of paragraph numbered (8) that the record in the

State court proceeding, considered as a whole, does not fairly support such factual determination, the burden shall rest upon the applicant to establish by convincing evidence that the factual determination by the State court was erroneous.

STATEMENT OF THE CASE

A. Procedural history. Respondent Greenawalt was captured on August 11, 1978, after having escaped from prison, and the events giving rise to this litigation took place on that same day. The Arizona Supreme Court upheld the admission of certain statements received from Greenawalt in an opinion which issued on January 23, 1981, and concerning which rehearing was denied on March 3, 1981. See State v. Greenawalt, 128 Ariz. 150, 624 P.2d 828 (1981). Greenawalt filed a petition for certiorari with this Court on May 4, 1981, which was assigned docket number 80-6614. Edwards v. Arizona, 451 U.S. 477 (1981), was issued by this Court exactly 2 weeks later, on May 18, 1981, so the Response to the Petition for Writ of Certiorari (authored by the same Assistant Attorney General who is presenting this Petition) specifically argued that Edwards was factually distinguishable and inapplicable. At least half a dozen cases pending before this Court were remanded for

reconsideration in light of Edwards. See Blakney v. Montana, 451 U.S. 1013 (1981); White v. Finkbeiner, 451 U.S. 1013 (1981); Leuschner v. Maryland, 451 U.S. 1014 (1981); Monroe v. Idaho, 451 U.S. 1014 (1981); Wantland v. Maryland, 451 U.S. 1014 (1981); James v. Illinois, 451 U.S. 1014 (1981). However, in Greenawalt's case certiorari was flatly denied. (454 U.S. 882.)

Greenawalt then attempted without success to obtain some relief from the state courts by means of a post-conviction proceeding, and having failed in that, he filed a petition for federal habeas corpus.

When the Edwards issue was raised in the District Court no effort was made to explore the factual inapplicability of Edwards because this Court seemed to have held that Edwards would not be applied retroactively, in Solem v. Stumes, 465 U.S. 638 (1984). Based on that decision the District Court held Edwards inapplicable to this case, though in a single line of dictum it suggested that if Edwards did apply,

Greenawalt's statements would not be admissible. Greenawalt v. Ricketts, Appendix 1 at 10. Subsequent to the District Court's denial of any relief the question of Edwards' applicability was reopened by this Court's decision in Shea v. Louisiana, 470 U.S. ____, 105 S.Ct. 1065 (1985). Shea held that Edwards would indeed apply to cases which were pending on direct review when Edwards was decided, apparently including cases which were awaiting decisions on petitions for certiorari. (105 S.Ct. at 1068, n. 3.) Declining to find any significance in this Court's flat denial of certiorari in Greenawalt's case at the same time other cases with Edwards issues were being remanded wholesale, the Ninth Circuit ruled that, based on Shea, the District Court should apply Edwards to the facts of this case. (Appendix 1 at 12-14.) Though both arguments had been thoroughly canvassed during the original briefing, as well as being pressed again by the petition for

rehearing, the Ninth Circuit failed even to mention the threshold issues of whether Edwards could be applied, because no "interrogation" had actually occurred, and because Greenawalt's consultation with his counsel before giving the statements had satisfied the demands of Edwards.

B. Factual background. The events leading up to the taking of the statements now in question are accurately summarized (with one major exception) in the opinion of the Court of Appeals:

> On July 30, 1978, Randy Greenawalt and Gary Tison, inmates at Arizona State Prison in Florence, Arizona, received guns from two of Tison's sons, Ricky and Raymond. The two prisoners escaped to a nearby green Ford sedan driven by Gary Tison's son, Donald. Soon after the escape, the five men (termed the "Tison gang" by the press) transferred to a white Lincoln Continental and drove away.
>
> * * *
>
> Greenawalt and the Tisons attempted to drive a

stolen van through a pair of police roadblocks on August 11, 1978. When the van went off the road during a high-speed chase, the police captured Greenawalt, Ricky Tison, and Raymond Tison. Donald Tison died during the chase. Gary Tison, who escaped capture at the roadblock site, died of exposure in the surrounding desert.

Around 3:00 A.M. on August 11, officers gave Greenawalt and the two surviving Tisons a pat-down search, handcuffed them, and placed them in a pickup truck. About half an hour later, the police moved the pickup to a different location, strip-searched the men (retaining their clothes as evidence), and left them, naked, in the truck. At some point later that morning, the men received wool blankets to wear. At approximately 5:00 A.M., the escapees were taken to separate vehicles.

Warden Cardwell read Greenawalt the Miranda warning and then asked him if he had any statements to make. Greenawalt refused to make any statements and requested an attorney. Cardwell did not ask Greenawalt any further questions at that time. Later in the day, two Pinal

County Detectives, Tom Solis and Ed Harwell, arrived to question Greenawalt. Cardwell may or may not have told one of the two detectives about Greenawalt's request for a lawyer. In any event, Harwell also read the prisoner the Miranda warning and asked him if he needed medical attention. When Harwell began to ask Greenawalt about Theresa Tyson, Greenawalt again requested a lawyer. Detective Solis, a short while later, asked Greenawalt if he already had a lawyer and if he would like to talk. Greenawalt responded that, although he did not want to talk at that time, he would talk to Solis later. The conversation with Solis ended around 7:00 A.M.

Sometime between 7:30 and 8:00 A.M., Corrections Director Ellis McDougall, who evidently had not heard about Greenawalt's request for an attorney but knew that he had been notified of his Miranda rights, met with the prisoner. McDougall said that he didn't want to talk about any crimes but was wondering about the location of Theresa Tyson. Greenawalt answered some questions but then requested a lawyer. At approximately 8:30 A.M., McDougall asked Assistant

Warden Dwight Burd to talk to the prisoner; McDougall probably did not pass along Greenawalt's request for an attorney. Burd, who had known Greenawalt for three years, testified that he did not know that Greenawalt had already refused to talk to the police. He, too, questioned Greenawalt for a while. The questioning stopped -- at about the point when Burd asked Greenawalt who had owned the stolen van -- when Greenawalt repeated his request for a lawyer.

Sometime between 8:30 and 9:24 A.M., McDougall approached Greenawalt again, and Greenawalt refused to talk to him. At 9:24 A.M., Department of Public Safety Agent David Sanchez gave the prisoner the Miranda warning again. Greenawalt refused to answer questions until he was given an attorney. He was then taken to the Pinal County jail around 11:30 A.M. and was examined by a doctor between 12:30 and 1:00 P.M. Earlier, at around 11:00 A.M., attorney Robert Brown had learned that he would be Greenawalt's counsel. The jail personnel did not permit Brown to see Greenawalt until 1:00 P.M.; at that time, the two men spoke for 10 to 15 minutes through a slit in a metal

door, with a prison guard standing next to Greenawalt.

(Appendix 1 at 1-6; emphasis added.)

The statement that the discussion between Greenawalt and his lawyer was done with a guard next to Greenawalt (which is made again later in the opinion, Appendix 1 at 14-15, n.2) is totally unsupported by the record. The only questions asked of Greenawalt at the suppression hearing about the conditions of the interview are as follows:

> Q. Moving down to approximately 11:30, do you remember arriving at the Pinal County Jail?
>
> A. Yes.
>
> Q. Do you remember talking to me?
>
> A. Yes.
>
> Q. How long had you been at the jail when you talked to me?
>
> A. Approximately an hour and a half, something like that.
>
> Q. Were you able to see me well?
>
> A. No.
>
> Q. Were you able to tell that

much who you were talking to?

A. No, because you were on the outside of a wall and a port, a little window.

(Transcript of Suppression Hearing, hereinafter Supp. R.T., at 139.) Greenawalt's trial lawyer filed a written suppression motion which purported to describe the circumstances of the interview. That motion was not properly before the Ninth Circuit; although it was appended to Greenawalt's Reply Brief, it was not part of the record filed in the District Court, and Greenawalt's motion to add the suppression motion to the record on appeal was never acted upon by the Ninth Circuit. Therefore, the assertions made in the suppression motion could not properly have been relied on by the Ninth Circuit, but even if they were, they do not support the ostensible statement of fact made by the Court of Appeals. The suppression motion claimed:

> Counsel proceeded to the jail and asked to see his client. He was told

> initially that he could not until after the arraignment but, after insisting was finally allowed to talk briefly with him through the jailer's window into the cell from the jailer's office. Counsel was in the presence of several jailers and could not see if anyone else was in the cell with his client.

Thus, even Greenawalt's own lawyer says that the jail personnel were outside the cell, in the office area, not in the cell "standing next to Greenawalt", and by the very fact that the conversation was done face to face through a small port in the door, it was undoubtedly done in a quiet, confidential manner.

None of the statements made by Greenawalt before his interview with his attorney were offered at trial. State v. Greenawalt, supra, 128 Ariz. at 157, 624 P.2d at 835. The only statements actually introduced were given by Greenawalt during a discussion which occurred at about 2:00 P.M., with a Coconino County detective named Tom Brawley, who had investigated Greenawalt's 1974 murder in Flagstaff.

(R.T. Vol. VI. at 894.) Brawley was unaware of any previous attempts to interview Greenawalt. (Brawley Deposition, hereinafter BD, at 7, 217.) He found Greenawalt asleep in the holding cell, woke him, obtained coffee and a cigarette for him, and engaged in neutral conversation for a few minutes. (Id. at 8-9.) When Brawley pointed out that he had come to ask questions, Greenawalt volunteered that he had a lawyer, but was nonetheless willing to answer some of Brawley's questions, though not all of them. (Id. at 9-10, 26.) Brawley agreed to this, read him the Miranda warnings off a form, and asked Greenawalt to sign a rights waiver. (Id. at 10.) Greenawalt refused to sign the form, but then himself initiated the substantive discussion by stating that he wanted to clear up the news coverage about the Tyson girl:

> Q. After you read him his rights, did he begin or did you begin questioning him about the events which you were investigating?

A. No. To begin with, he told me what he wanted to clear up was the news coverage of Theresa Tyson.

Q. This was after he was advised of his rights or earlier?

A. Yes; after.

(Id. at 11.) After Greenawalt made several statements about the missing girl, Brawley attempted to question him on some other topics, but was told each time that Greenawalt didn't want to talk about those matters, so the conversation ended. (Id. at 12-13, 14, 30-31.) Both the trial court and the Arizona Supreme Court specifically found that the statements had been given freely and voluntarily. State v. Greenawalt, 128 Ariz. at 156-60, 624 P.2d at 834-38.)

REASONS FOR GRANTING THE WRIT

I. IN DIRECTING THE DISTRICT COURT TO CONSIDER THIS CASE IN LIGHT OF EDWARDS V. ARIZONA THE COURT OF APPEALS IGNORED THE FACT THAT EDWARDS IS NOT APPLICABLE BECAUSE GREENAWALT WAS NOT SUBJECTED TO "INTERROGATION". PERMITTING THIS PUBLISHED DIRECTIVE TO PERSIST TENDS TO INJECT A WHOLLY ERRONEOUS MODE OF ANALYSIS INTO WHAT IS ALREADY A DIFFICULT AREA, SO CERTIORARI SHOULD BE GRANTED TO CORRECT THE SITUATION.

The Court of Appeals ordered this case to be remanded for consideration by the District Court in light of Edwards v. Arizona. So to do assumes that Greenawalt was the subject of interrogation, because Edwards is irrelevant where interrogation has not occurred, but the record here makes clear that no interrogation of the sort which this Court recognizes took place. Thus, it appears that the Ninth Circuit has totally misconceived the mode of analysis to be employed in cases like this, and by effectively directing District Courts through its published opinion to ignore the threshold question of whether there even was "interrogation" conducted, it has injected grave error into the proceedings of any court which employs its simplistic approach.

Both Edwards and its progenitor, Miranda v. Arizona, 384 U.S. 436 (1966), were primarily concerned with the coercion involved in interrogation of criminal suspects. For example, Miranda states:

> If the individual states

that he want an attorney, the interrogation must cease until an attorney is present. At that time, the individual must have an opportunity to confer with the attorney and to have him present during any subsequent questioning. If the individual cannot obtain an attorney and he indicates that he wants one before speaking to police, they must respect his decision to remain silent.

* * *

If the interrogation continues without the presence of an attorney and a statement is taken, a heavy burden rests on the government to demonstrate that the defendant knowingly and intelligently waived his privilege against self-incrimination and his right to retained or appointed counsel. Escobedo v. State of Illinois, 378 U.S. 478, 490, n.14, 84 S.Ct. 1758, 1764, 12 L.Ed.2d 977. This Court has always set high standards of proof for the waiver of constitutional rights, Johnson v. Zerbst, 304 U.S. 458, 58 S.Ct. 1019, 82 L.ed. 1461 (1938), and we reassert these standards as applied to in-custody interrogation. Since the State is responsible for establishing the isolated circumstances under which the interrogation takes place and has the only means of making available corroborated evidence of warnings given during incommunicado

> interrogation, the burden is rightly on its shoulders.

(384 U.S. at 474-75; emphasis added.) And again:

> He must be warned prior to any questioning that he has the right to remain silent, that anything he says can be used against him in a court of law, that he has the right to the presence of an attorney, and that if he cannot afford an attorney one will be appointed for him prior to any questioning if he so desires. Opportunity to exercise these rights must be afforded to him throughout the interrogation. After such warnings have been given, and such opportunity afforded him, the individual may knowingly and intelligently waive these rights and agree to answer questions or make a statement. But unless and until such warnings and waiver are demonstrated by the prosecution at trial, no evidence obtained as a result of interrogation can be used against him.

(384 U.S. at 479; emphasis added.) The same concern is manifest in Edwards:

> Second, although we have held that after initially being advised of his Miranda rights, the accused may himself validly waive his rights and respond to interrogation, see North

> Carolina v. Butler, supra, 441 U.S., at 372-376, 99 S.Ct., at 1757-1759, the Court has strongly indicated that additional safeguards are necessary when the accused asks for counsel; and we now hold that when an accused has invoked his right to have counsel present during custodial interrogation, a valid waiver of that right cannot be established by showing only that he responded to further police-initiated custodial interrogation even if he has been advised of his rights. We further hold that an accused, such as Edwards, having expressed his desire to deal with the police only through counsel, is not subject to further interrogation by the authorities until counsel has been made available to him, unless the accused himself initiates further communication ...

(451 U.S. at 484; emphasis added.)

It necessarily follows that if there is no "interrogation", then the concerns which activate Miranda and Edwards simply never arise.

In Rhode Island v. Innis, 446 U.S. 291 (1980), this Court made clear that not all custodial comunication (nor even all custodial questioning) constitutes

"interrogation" that will trigger Miranda.

> It is clear therefore that the special procedural safeguards outlined in Miranda are required not where a suspect is simply taken into custody, but rather where a suspect in custody is subjected to interrogation. "Interrogation," as conceptualized in the Miranda opinion, must reflect a measure of compulsion above and beyond that inherent in custody itself.
>
> We conclude that the Miranda safeguards come into play whenever a person in custody is subjected to either express questioning or its functional equivalent. That is to say, the term "interrogation" under Miranda refers not only to express questioning, but also to any words or actions on the part of the police (other than those normally attendant to arrest and custody) that the police should know are reasonably likely to elicit an incriminating response from the suspect. The latter portion of this definition focuses primarily upon the perceptions of the suspect, rather than the intent of the police. This focus reflects the fact that the Miranda safeguards were designed to vest a suspect in custody with an added measure of protecton against coercive police practices, without regard to objective proof of the underlying intent of the

> police. A practice that the police should know is reasonably likely to evoke an incriminating response from a suspect thus amounts to interrogation. But, since the police surely cannot be held accountable for the unforeseeable results of their words or actions, the definition of interrogation can extend only to words or actions on the part of police officers that they should have known were reasonably likely to elicit an incriminating response.

(446 U.S. at 300-02; emphasis in original.)

It is plain that Detective Brawley could not reasonably have anticipated receiving an incriminating response at the preliminary stage of the conversation, when Greenawalt suddenly took control of it and made his statements. Brawley had begun with obviously non-interrogatory steps, making neutral "small talk" and explaining his need to ask some questions; Greenawalt replied that he had an attorney, but would still speak to Brawley about some things. (B.D. at 8-10.) After being read his rights and looking at the waiver form, Greenawalt declined to sign it, but before Brawley

could ask anything, Greenawalt initiated discussion about the still-missing Tyson girl:

> Q. After you read him his rights, did he begin or did you begin questioning him about the events which you were investigating?
>
> A. No. To begin with, he told me what he wanted to clear up was the news coverage of Theresa Tyson.
>
> Q. This was after he was advised of his rights or earlier?
>
> A. Yes; after.
>
> Q. You recall, as best you can, the words he used in bringing that topic up?
>
> A. He just said, "There are some things about the girl," I believe is the way he referred to her, that he wanted to clear up. I said fine. He said that the news accounts were wrong; that they did not take the girl; that she wasn't taken as hostage; that she was not sexually assaulted in any manner. I think that's about what he said. I then asked him if they didn't take her, where was she, and he told me she should have been where the rest of the bodies were located. I told him that the Yuma County authorities had been unable to locate her and he said, "Well, all they have

> to do is look, she's got to be there. We didn't take her." I asked him how he could be so sure she was there. He says, "Because she couldn't have gone anywhere." I asked him was she shot and he replied, "You're God damn right she was shot."
>
> Q. After this initial discussion about the subject of the body of Theresa Tyson, did you get into other or attempt to get into other areas with him?
>
> A. Yes. I attempted to and I would ask him a question about some phase of the investigation and he said that he didn't want to reply to that and I said fine.

(Id. at 11-13.)

These facts do not reflect "a measure of compulsion above and beyond that inherent in custody itself" at the time Greenawalt himself acted to bring out the information about Theresa Tyson. While Detective Brawley obviously intended to attempt interrogation eventually, his actions were all neutral and preliminary, and could not themselves have been reasonably expected to elicit anything incriminating. That Greenawalt would decide to "clear up" things

about the girl while Brawley was still cautiously trying to insure that proper warnings had been given, etc., could not have been anticipated.

The Court of Appeals pointed out in United States v. Thierman, 678 F.2d 1331, 1335 (9th Cir. 1982), that, "By holding in Innis that police statements that acted as subtle compulsion did not constitute interrogation, the Supreme Court appears to have narrowly construed what is reasonably likely to elicit an incriminating response." The Court of Appeals found no such "interrogation" where, after an individual invoked his right to counsel, the investigators in his presence discussed their future investigative steps, including possibly having to involve the man's girlfriend, and he decided to speak. Other cases applying the same narrow interpretation of "interrogation", but factually closer to the present situation, include United States v. Hackley, 636 F.2d 493, 498 (D.C. Cir. 1980), where an improper

but neutral reinitiation of contact was met with a blurted confession:

> As indicated above, while Fontanna and Hackley were filling out the police report form, Hackley interrupted it to talk about his cousin Sharon. Following that part of the conversation Detective Fontanna asked Hackley, "what he was going to do in response to the holdup" (Tr. 37,44) (Emphasis added). Under Miranda it was generally improper to interrogate Hackley about the bank robbery after he had refused to discuss it with Colver, but Fontanna's inquiry followed the casual conversation about Hackley's cousin Sharon and their attempt to reach her on the telephone, and fairly construed, it was not directed at obtaining a confession. The normal response one would expect from Hackley to Fontanna's question, in view of Hackley's earlier statement that he was out of town on the day of the robbery, would be a statement that he was pleading not guilty, or that he wanted a lawyer, or, as he had indicated to Agent Colvert, that he did not want to talk about it. A fair reading of the record indicates that Hackley's reply was unexpected. However, instead of answering, or not answering, in the vein that might have been expected, Hackley blurted out a complete confession in just a few

> sentences. Fontanna's inquiry did not call for a confession and, under the circumstances of this case, it would be unreasonable to interpret Miranda as requiring a third Miranda warning by a person who was present as one of the arresting officers a short time previously when the first Miranda warning was given and who heard Hackley's reply that he "understood" his Miranda rights. It is also significant that Fontanna's question related to the same crime that had been the subject of the initial Miranda warning.
>
> What is significant about the colloquy which produced Hackley's initial admission is that the response by Hackley, while not completely unresponsive, did exceed the answer that the question called for or that could have been reasonably expected by Fontanna.

(Emphasis added.)

Hence, the statement was held not to have resulted from "interrogation". In the same way, Greenawalt's statements about the Tyson girl went far beyond what could have been expected as responses to Brawley's neutral inquiries about whether he could question Greenawalt. Also instructive are

the following:

United States v. Guido, 704 F.2d 675 (2nd Cir. 1983), and United States v. Gazzara, 587 F. Supp. 311 (S.D.N.Y. 1984) -- merely asking an arrestee if he will cooperate is not "interrogation" because it is not likely to elicit an incriminating response, so statements were admissible despite previous requests for counsel.

United States v. Emery, 682 F.2d 493, 501 (5th Cir. 1982), cert. denied, 459 U.S. 1044 -- "It borders on absurd to characterize an inquiry into whether a defendant understands his Miranda rights as an 'interrogation' justifying exclusion" because it is not reasonably likely to elicit anything incriminating.

State v. Acquin, 187 Conn. 647, 448 A.2d 163 (1982) -- inquiries about which lawyer defendant wants after he invokes right to counsel do not constitute interrogation.

These cases should leave no doubt that, in the limited sense allowed by Rhode Island

v. Innis, Tom Brawley never had a chance to "interrogate" Greenawalt. His inquiries were really asking if he could ask potentially incriminating questions, and were not themselves likely to elicit incriminatory matter. Greenawalt's spontaneous statements therefore fell outside of Miranda and Edwards, and needed only to be shown to have been voluntary to to admissible. Both the trial court and the Arizona Supreme Court found the statements to have been wholly voluntary (State v. Greenawalt, supra, 128 Ariz. at 160, 624 P.2d at 838), and so did the District Court. (Appendix 1 at 10.)

The bottom line is that the Ninth Circuit has sent the District Court on a legal "snipe hunt", telling it to make a "thorough and reasoned application" to this case of that which is, by definition, inapplicable. Moreover, it has done so through the especially pernicious medium of a published opinion (which plainly can

mislead many courts, instead of just the one District Court which would have been misdirected if only a memorandum decision had issued). Despite this Court's efforts to provide "bright line" rules there are still elements of Miranda which remain murky, so the last thing needed is a misconceived mode of analysis that ignores fundamental questions such as whether "interrogation" even took place. The potential for far-flung error is great, so this Court should grant certiorari, apply its guiding hand, and nip the problem in the bud.

II. MIRANDA AND EDWARDS ARE SATISFIED IF AN ARRESTEE WHO INVOKES HIS RIGHT TO COUNSEL IS PROVIDED OPPORTUNITY TO CONSULT WITH COUNSEL. SINCE GREENAWALT CONSULTED WITH COUNSEL BEFORE THE POLICE ATTEMPTED TO RESUME QUESTIONING, IT WAS ERROR FOR THE NINTH CIRCUIT TO REMAND THIS CASE FOR FURTHER CONSIDERATION IN LIGHT OF EDWARDS, AND THIS COURT SHOULD GRANT CERTIORARI TO MAKE PLAIN THAT POLICE CAN REINITIATE COMMUNICATION AFTER INVOCATION OF THE RIGHT TO COUNSEL, IF SUCH OPPORTUNITY FOR CONSULTATION HAS BEEN PROVIDED.

The Court of Appeals made an additional

major error in remanding this case for consideration in light of Edwards v. Arizona by ignoring the fact that Edwards can actually be satisfied in either of two ways, and the available record plainly shows that it was satisfied. By remanding for unnecessary further consideration, the Court of Appeals has severely obscured the true meaning of Edwards, thereby sowing broadside the seeds of future analytical errors.

The theory behind both Edwards and Miranda is that a person is subjected to an inherently coercive situation by being taken into custody and questioned, but that this coercion is dissipated by the intervention of legal counsel. Once the coerciveness of the custodial situation is broken down by the consultation, the arrestee is on an essentially equal footing with a questioner. Therefore, when post-consultation interviews are done the issue is one of voluntariness, not the per se rule against all questions which characterizes the pre-consultation stage where the Miranda

rights are invoked. Miranda clearly states this, several times over:

> The mere fact that he may have answered some questions or volunteered some statements on his own does not deprive him of the right to refrain from answering any further inquiries until he has consulted with an attorney and thereafter consents to be questioned.
>
> (384 U.S. at 445; emphasis added.)

> If the individual states that he wants an attorney, the interrogation must cease until an attorney is present. At that time, the individual must have an opportunity to confer with the attorney and to have him present during any subsequent questioning.
>
> * * *
>
> An express statement that the individual is willing to make a statement and does not want an attorney followed closely by a statement could constitute a waiver. But a valid waiver will not be presumed simply from the silence of the accused after warnings are given or simply from the fact that a confession was in fact eventually obtained.
>
> (384 U.S. at 474-75; emphasis added.)

> Opportunity to exercise these rights must be afforded to him throughout the interrogation. After such warnings have been given, and such opportunity afforded him, the individual may knowingly and intelligently waive these rights and agree to answer questions or make a statement.
>
> (384 U.S. at 479; emphasis added.)

Thus, Miranda itself leaves no doubt that if the arrestee asks for counsel, no more questions can be asked until the lawyer is made available; however once the consultation with counsel has occurred, the absolute ban on communication ends, and admissibility of post-consultation questions is determined by a standard voluntariness/waiver analysis. This doctrine has not been changed by the decisions succeeding Miranda. This Court referred in Rhode Island v. Innis, supra, to the person's right under Miranda to be free from interrogation "until he had consulted with a lawyer". (446 U.S. at 298.) Edwards both quotes this language and reiterates the same thought in its own terms:

> [A]n accused, such as Edwards, having expressed his desire to deal with the police only through counsel, is not subject to further interrogation by the authorities until counsel has been made available to him, unless the accused himself initiates further communication...

(451 U.S. at 485-86.) In discussing its own facts, Edwards emphasizes that the police reinitiated interrogation "without making counsel available", and that "His statement made without having had access to counsel did not amount to a valid waiver and hence was inadmissible." (451 U.S. at 487.) In deciding the retroactivity issue, Shea v. Louisiana, supra, restated the heart of Edwards in the very language quoted above. (105 S.Ct. at 1068.) Thus, despite the furor and emphasis placed on the "initiation" aspect of the decision, Edwards (as well as Miranda itself) provides for two alternative situations in which police can legitimately ask questions after the right to counsel has been invoked -- when the lawyer had been provided for consultation

and when the person himself initiates the contact. Nor must the consultation with counsel be continuous. Just this term this court pointed out that the approach taken by the Miranda court had rejected the concept that the coercion inherent in custodial interrogation could only be dissipated by the actual presence of counsel during the interrogation. See Moran v. Burbine, ___ U.S. ___, 106 S.Ct. 1135, 1144 (1985).

That Miranda and Edwards are correctly understood to permit both of these alternatives is demonstrated by acceptance of this analysis by a variety of courts. A good example is United States v. Halliday, 658 F.2d 1103 (6th Cir. 1981), cert. denied, 454 U.S. 1127. Statements made after the FBI reinitiated communications were found admissible because the person had had opportunity to consult with counsel.

> Edwards emphasizes the necessity of counsel being made "available" or of the defendant having "access" to counsel, 451 U.S. 484-87, 101 S.Ct. at 1885, 1886, rather than holding that once the

> accused requests counsel he may thereafter be questioned only in the presence of counsel. Here Gallagher had access to two attorneys. Court-appointed counsel was made available to him, and in addition he retained and spoke with private counsel. Thus the FBI did not impermissibly initiate a second interrogation after defendant requested counsel.

(658 F.2d at 1104-05; emphasis in original.) In Bartlett v. Allen, 724 F.2d 1524 (11th Cir. 1984), police continued questioning and obtained statements after a request for counsel; however, the defendant ratified them after consulting with his lawyer, so they were held to have been properly admitted:

> Bartlett cites numerous cases in support of his argument that there can be no waiver of the privilege against self-incrimination and of the right to counsel. See United States v. Massey, 550 F.2d 300 (5th Cir. 1977), United States v. Blair, 470 F.2d 331 (5th Cir. 1972), United States v. Priest, 409 F.2d 491 (5th Cir. 1969). However, in none of these cases was the defendant's attorney present during any phase of the questioning. Likewise, the Supreme Court's

> recent decisions in Edwards v. Arizona, 451 U.S. 477, 101 S.Ct. 1880, 68 L.Ed.2d 378 (1981) and Oregon v. Bradshaw, ___ U.S. ____, 103 S.Ct. 2830, 77 L.Ed.2d 405 (1983), establish an analysis of circumstances in which "an accused ..., having expressed his desire to deal with the police only through counsel, is not subject to further interrogation by the authorities until counsel has been made available to him..." Id. (emphasis added). The stringent test of waiver as mandated by the Supreme Court and the Fifth Circuit was designed specifically for situations in which an accused does not have the safeguard of a knowledgeable attorney to represent his interests. In instances where such an attorney does appear, as here, that test no longer controls.

(724 F.2d at 1528; emphasis added.) In United States v. Packer, 730 F.2d 1151 (8th Cir. 1984), a statement made as the result of questioning after a request for counsel was held properly excluded, but a subsequent statement, made after consulting with the lawyer, was admissible. In People v. Denby, 102 Ill. App. 3d 1141, 430 N.E.2d 507 (1981), interrogation ceased when the

defendant requested counsel. The lawyer met with him and told the detective not to talk to the defendant further. A day and a half later the detective nonetheless approached the defendant, reminded him of what the lawyer had said, and asked if he would consent to talk, and when the defendant agreed, the resultant statements were held to be admissible. Finally, there is Davis v. State, 406 So.2d 795, 800 (Miss. 1981), app. dism. and cert. denied, 457 U.S. 1113 (1982):

> The circumstances in this case parallel rather closely the facts of Edwards, but with some significant differences. Both cases concern a second police-initiated interrogation, but here Davis made an express waiver of his right to remain silent while Edwards evidenced opposition to the interrogation. Moreover, in Edwards the second interrogation occurred before counsel had been made available to him. Yet here Davis' request for counsel was immediately complied with during the afternoon interrogation. The officer telephoned Davis' attorney and permitted him to speak with the attorney. After talking with the attorney, Davis

reported to the officer that the attorney would come to the sheriff's office that afternoon and confer with him; however, the attorney did not come to the sheriff's office that afternoon and did not confer with Davis that date except in the telephone conversation. Some nine hours later the sheriff and a deputy talked with Davis and obtained his confession. Although this interrogation was initiated by the sheriff, Davis was advised of his rights and waived them. Davis told the sheriff he had spoken to his attorney, but he was still willing to talk to the sheriff at that time. We conclude that after Davis' counsel failed to appear in the afternoon, he willingly waived the presence of counsel and willingly answered questions of the sheriff. Comparison of these cases reveals both access to counsel and an express willingness to talk in this case which were not present in Edwards.

* * *

The Edwards Court stressed throughout the opinion that the Court was not abandoning prior decisions, rather reconfirming and emphasizing the importance of the Miranda safeguards surrounding an accused's right to counsel. In considering the factual distinctions between these two cases it appears to us that Edwards is not presently

> controlling because the record reveals that Davis' constitutional right to counsel was meticulously protected as required by Miranda and Edwards. We, therefore, think this assignment of error is without merit.

The implications of the foregoing analysis are obvious. Although Greenawalt was improperly questioned in the field after he had asked for counsel, the only statements admitted were those given to Detective Brawley at the jail. Brawley did not speak to Greenawalt until hours after the previous questioning had ended, and after Greenawalt had spoken with his lawyer. In responding to Brawley Greenawalt specifically noted that he had counsel, but desired to speak to Brawley anyway. The absolute rule against further questioning had been rendered inoperative by the consultation with the lawyer, which satisfied the concerns motivating the decisions in Miranda and Edwards, so the only remaining question was voluntariness. That is a non-issue, because every court to

address the matter has concluded that Greenawalt's statements were wholly voluntary.

This petition presents the Court with the opportunity to further clarify precisely what Edwards really means, by explicating the repeated references in both Miranda and Edwards to "opportunity" for consultation and "access" to counsel during the interrogation process. As demonstrated by the cases previously cited, several of the more carefully analytical state and federal lower courts have correctly understood the implications of that language, but the Ninth Circuit's failure even to address the issue indicates that it does not. Granting certiorari in this case would serve not merely as an occasion to correct that court's erroneous views (because this Court does not sit to correct every error made known to it), but, more importantly, would provide opportunity to throw light on an aspect of Miranda and Edwards which until now has been widely misunderstood or ignored.

CONCLUSION

The superficial opinion rendered by the Ninth Circuit demonstrates that it has either ignored or misinterpreted several of this Court's major decisions (including Miranda, Edwards, and Innis), and has thereby opened the door for similarly faulty analysis by many other courts. This Court's discretion in granting certiorari is guided by considerations including conflicts of interpretation between federal courts of appeals, or a federal court of appeals and a state's highest court; inappropriate sanctioning of lower court methods by a federal court of appeals; decisions which conflict with applicable decisions of this Court; and lower court decisions on important issues of federal law which should be resolved by this Court. Supreme Court Rule 17.1(a) and (c). All of these considerations are, to some degree, present in this case. It would be a sad thing if this opportunity to clarify Miranda and Edwards should be permitted to go

aglimmering; certiorari should be granted, on both the questions presented for review.

Respectfully submitted,

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Randy GREENAWALT,
Petitioner-Appellant,

v.

James R. RICKETTS, Director of Corrections; Donald Wawrzasek, Superintendent of the Arizona State Prison; and Robert K. Corbin, Attorney General, State of Arizona, Respondents-Appellees.

No. 84-2752.

United States Court of Appeals,
Ninth Circuit.

Argued and Submitted Dec. 4, 1985

Decided March 20, 1986.

Before BROWNING, SNEED, and HUG, Circuit Judges.

SNEED, Circuit Judge:

This is an appeal from the denial by the district court of a petition for a writ of habeas corpus. We reverse and remand for further proceedings with respect to the petition.

I.

FACTS AND PROCEEDINGS BELOW

On July 30, 1978, Randy Greenawalt and Gary Tison, inmates at Arizona State Prison

in Florence, Arizona, received guns from two of Tison's sons, Ricky and Raymond. The two prisoners escaped to a nearby green Ford sedan driven by Gary Tison's son, Donald. Soon after the escape, the five men (termed the "Tison gang" by the press) transferred to a white Lincoln Continental and drove away.

On August 6, 1978, state employees discovered the bodies of John and Donnelda Lyons and their son Christopher near the abandoned Lincoln Continental, in the area around Quartzsite, in Yuma County, Arizona. On August 11, 1978, searchers at the site found the body of Theresa Tyson, the Lyonses' niece. All four victims had been shot to death. Evidence implicating the escapees included (1) Greenawalt's palm print on the outside of the car, (2) Raymond Tison's fingerprint inside the car, and (3) gun shells that matched the guns recovered from the escapees when they were captured. Forensic experts determined that the victims died at some time between July 31 and August

2, 1978.

Greenawalt and the Tisons attempted to drive a stolen van through a pair of police roadblocks on August 11, 1978. When the van went off the road during a high-speed chase, the police captured Greenawalt, Ricky Tison, and Raymond Tison. Donald Tison died during the chase. Gary Tison, who escaped capture at the roadblock site, died of exposure in the surrounding desert.

Around 3:00 A.M. on August 11, officers gave Greenawalt and the two surviving Tisons a pat-down search, handcuffed them, and placed them in a pickup truck. About half an hour later, the police moved the pickup to a different location, strip-searched the men (retaining their clothes as evidence), and left them, naked, in the truck. At some point later that morning, the men received wool blankets to wear. At approximately 5:00 A.M., the escapees were taken to separate vehicles.

Warden Caldwell [sic] read Greenawalt the Miranda warning and then asked him if he

had any statements to make. Greenawalt refused to make any statements and requested an attorney. Cardwell did not ask Greenawalt any further questions at that time. Later in the day, two Pinal County Detectives, Tom Solis and Ed Harwell, arrived to question Greenawalt. Cardwell may or may not have told one of the two detectives about Greenawalt's request for a lawyer. In any event, Harwell also read the prisoner the Miranda warning and asked him if he needed medical attention. When Harwell began to ask Greenawalt about Theresa Tyson, Greenawalt again requested a lawyer. Detective Solis, a short while later, asked Greenawalt if he already had a lawyer and if he would like to talk. Greenawalt responded that, although he did not want to talk at that time, he would talk to Solis later. The conversation with Solis ended around 7:00 A.M.

Sometime between 7:30 and 8:00 A.M., Corrections Director Ellis McDougall, who evidently had not heard about Greenawalt's

request for an attorney but knew that he had been notified of his Miranda rights, met with the prisoner. McDougall said that he didn't want to talk about any crimes but was wondering about the location of Theresa Tyson. Greenawalt answered some questions but then requested a lawyer. At approximately 8:30 A.M., McDougall asked Assistant Warden Dwight Burd to talk to the prisoner; McDougall probably did not pass along Greenawalt's request for an attorney. Burd, who had known Greenawalt for three years, testified that he did not know that Greenawalt had already refused to talk to the police. He, too, questioned Greenawalt for a while. The questioning stopped -- at about the point when Burd asked Greenawalt who had owned the stolen van -- when Greenawalt repeated his request for a lawyer.

Sometime between 8:30 and 9:24 A.M., McDougall approached Greenawalt again, and Greenawalt refused to talk to him. At 9:24 A.M., Department of Public Safety Agent David Sanchez gave the prisoner the Miranda

warning again. Greenawalt refused to answer questions until he was given an attorney. He was then taken to the Pinal County jail around 11:30 A.M., and was examined by a doctor between 12:30 and 1:00 P.M. Earlier, at around 11:00 A.M., attorney Robert Brown had learned that he would be Greenawalt's counsel. The jail personnel did not permit Brown to see Greenawalt until 1:00 P.M.; at that time, the two men spoke for 10 or 15 minutes through a slit in a metal door, with a prison guard standing next to Greenawalt.

At 2:00 P.M., Tom Brawley, a detective who had known Greenawalt since 1974, questioned him. Brawley testified that he did not know about any previous attempts at interrogation. When Brawley entered the cell, Greenawalt was sleeping. Brawley woke him, brought him coffee and a cigarette, and chatted with him for a while. Then Brawley told him that he had come to ask questions and he read Greenawalt his rights from a waiver. Greenawalt refused to sign the waiver. It was at this point in the

interrogation process that he made his most incriminating statements. His refusal to sign the waiver was coupled with the statement that he "wanted to clear up the news media stories of Teresa [sic] Tyson." When Brawley asked him to clarify that remark, he replied, "We didn't kidnap the girl, nor was she sexually molested." Brawley responded by asking where Theresa Tyson was located, since she had not been found with the other bodies. Greenawalt responded, "Well, we left her there .... [J]ust look around because she has to be there." Brawley asked whether she had been shot. Greenawalt answered, "You goddamn right she was shot." 6 R.T. at 898-99.

Greenawalt was tried in Arizona for the four Yuma County killings. Ricky and Raymond Tison agreed to testify against him in exchange for the state's agreement not to seek the death penalty for them. The Yuma County Attorney mentioned their proposed testimony in his opening argument. When the Tison brothers reneged on their agreement,

the trial judge declared a mistrial. At the second trial, the prosecution argued that Greenawalt had committed first degree murder by violating Ariz.Rev.Stat.Ann. § 13-452, which deals with killings "committed in avoiding or preventing lawful arrest or effecting an escape from legal custody, or in perpetration of ... robbery ... [or] kidnapping." The jury convicted Greenawalt on four counts of first degree murder, kidnapping, robbery, and theft. At a separate capital sentencing hearing, the trial judge sentenced him to death based on the murder conviction.

The Arizona Supreme Court affirmed the conviction and sentence in State v. Greenawalt, 128 Ariz. 150, 624 P.2d 828 (en banc), later proceeding, 128 Ariz. 388, 626 P.2d 118 (1981)(en banc), and the United States Supreme Court denied certiorari on October 5, 1981, 454 U.S. 882, 102 S.Ct. 364, 70 L.Ed.2d 191. Greenawalt then filed a petition for post-conviction relief in state court. That petition was denied, 128

Ariz. 388, 626 P.2d 118 (1981)(en banc), as was his December 21, 1981 petition for a writ of habeas corpus filed in the district court in Arizona. The district court denied the petition on the ground that he had not exhausted his state court remedies. Greenawalt later filed an amended petition for a writ of habeas corpus on May 31, 1984.

The district court issued a memorandum opinion and order on August 6, 1984, denying the petition and, on December 13, 1984, issued an amended opinion denying the petition. Greenawalt filed his notice of appeal on time.

II.

DISCUSSION

Greenawalt raised numerous issues on appeal from the denial of his petition for a writ of habeas corpus. Because we reverse and remand to enable the district court to apply Edwards v. Arizona, 451 U.S. 477, 101 S.Ct. 1880, 68 L.Ed.2d 378 (1981), to the facts of this case, we believe that to

conserve judicial resouces we should decline to reach the other issues.

The district court noted in one line of its disposition that, if Edwards v. Arizona, 451 U.S. 477, 101 S.Ct. 1880, 68 L.Ed.2d 378 (1981), were applied to Greenawalt's case, the statements to Detective Tom Brawley would not have been admissible.[1] The court, however, interpreted a recent Supreme Court decision, Solem v. Stumes, 465 U.S. 638, 104 S.Ct. 1338, 79 L.Ed.2d 579 (1984), to preclude the application of Edwards and found that Greenawalt's statements to Brawley were voluntary. In Solem v. Stumes, the Court held that Edwards would not be applied "retroactively," since Edwards had not been "'clearly' or 'distinctly' foreshadowed" by previous law. Id. at 649, 104 S.Ct. at 1345. Also, in Stumes, direct appeals were exhausted prior to the date of the Edwards decision and the case was before

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1 E.R. [sic] item 7 at 17.

the Supreme Court as a result of the prisoner's collateral attack on his conviction. Subsequently, the Supreme Court further clarified its Stumes decision by holding that Edwards was applicable to all cases pending on direct review at the time of Edwards. See Shea v. Louisiana, ___ U.S. ___, 105 S.Ct. 1065, 1071, 84 L.Ed.2d 38 (1985). Edwards remains inapplicable to all cases in which direct review has been completed prior to the Edwards decision date.

Greenawalt contends his case is governed by Shea v. Louisiana, ___ U.S. ___, 105 S.Ct. 1065, 84 L.Ed.2d 1065 (1985), not Stumes. He relies on language in Shea at ___, 105 S.Ct. at 1068 n.3. That note reads in part: "Had petitioner's [Shea's] case been pending here on certiorari when Edwards was announced, it surely would have been remanded, as were other such cases, for reconsideration in the light of Edwards." Edwards was decided on May 18, 1981, and Greenawalt filed his petition for certiorari on May 11, 1981. Certiorari, as already

mentioned, was denied on October 5, 1981. The Court, as Sheas' footnote 3 indicated, did remand other cases in light of Edwards. See Blakney v. Montana, 451 U.S. 1013, 101 S.Ct. 2999, 69 L.Ed.2d 384 (1981); White v. Finkbeiner, 451 U.S. 1013, 101 S.Ct. 3000, 69 L.Ed.2d 385 (1981); Leuschner v. Maryland, 451 U.S. 1014, 101 S.Ct. 3001, 69 L.Ed.2d 385 (1981); Monroe v. Idaho, 451 U.S. 1014, 101 S.Ct. 3001, 69 L.Ed.2d 385 (1981); Wantland v. Maryland, 451 U.S. 1014, 101 S.Ct. 3001, 69 L.Ed.2d 386 (1981); James v. Illinois, 451 U.S. 1014, 101 S.Ct. 3001, 69 L.Ed.2d 386 (1981).

The footnote 3 of Shea and the denial of Greenawalt's petition for certiorari present us with a dilemma. Either the Supreme Court's footnote 3 should be completely ignored and this case analyzed uninfluenced by that footnote, or the Supreme Court did not believe that the questioning of Greenawalt violated the rule of Edwards, or the denial certiorari, despite the language of footnote 3, indicates

nothing with respect to whether Greenawalt's questioning violated Edwards. This being a capital case, we must accept and be governed by the third alternative. Moreover, this is consistent with the long acknowledged principle that denials of certiorari are not decisions on the merits and carry no precedential value. United States v. Carver, 260 U.S. 482, 490, 43 S.Ct. 181, 182, 67 L.Ed. 361 (1923); 1B J. Moore, J. Lucas & T. Currier, Moore's Federal Practice ¶ 0.402[2], at 30-31 (2d ed. 1984).

It follows that we reject the government's contention that the Supreme Court previously held that Edwards was inapplicable to the facts of this case. Moreover, because Greenawalt's petition for certiorari following direct review of his conviction by the Supreme Court of Arizona was pending when Edwards was decided and was thereafter denied, we hold that this case is governed by Shea and not Stumes. That is, Greenawalt's case was pending on direct

review at the time Edwards was decided and thus was entitled to the degree of retroactivity of Edwards that Shea permits. In short, Edwards must be applied to the facts of Greenawalt's questioning.

Because we are reluctant to accept as conclusive the district court's one-line statement that Brawley's questioning violated Edwards,[2] and because on the basis of this record we are uncertain what the consequences of any such violation should be, we remand this case to the district court for a thorough and reasoned application of Edwards to the facts of this case. Therefore, we reverse and remand this case.

REVERSED AND REMANDED.

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2 Edwards held that "an accused, ... having expressed his desire to deal with the police only through counsel, is not subject to further interrogation by the authorities until counsel has been made available to him, unless the accused himself initiates further communication, exchanges, or conversations with the police," 451 U.S. at 484-85, 101 S.Ct. at 1885. An argument may

be made that Greenawalt's 10-15 minute consultation with his lawyer, conducted through a small hole in a door, with a jailer standing next to the prisoner, constituted making counsel "available" to him. We express no opinion regarding the merits of this argument.

ORIGINAL

Supreme Court, U.S.
FILED
SEP 22 1986
JOSEPH F. SPANIOL, JR.
CLERK

No. 86-315

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1985

JAMES R. RICKETTS, Director of the Arizona Department of Corrections; DONALD WAWRZASEK, Superintendent of the Arizona State Prison; and ROBERT K. CORBIN, Attorney General of Arizona,

Petitioners,

vs.

RANDY GREENAWALT,

Respondent.

RESPONDENT'S MOTION TO PROCEED IN FORMA PAUPERIS

Respondent Randy Greenawalt hereby requests permission to proceed in this Court in forma pauperis. Respondent proceeded in forma pauperis in the District Court and Court of Appeals and undersigned counsel was appointed pursuant to the Criminal Justice Act of 1964.

RESPECTFULLY SUBMITTED this 18th day of September, 1986.

Curtis Ullman
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Phoenix, Arizona 85004
Attorney for Respondent
Randy Greenawalt

No. 86-315

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1985

JAMES R. RICKETTS, Director of the Arizona Department of Corrections; DONALD WAWRZASEK, Superintendent of the Arizona State Prison; and ROBERT K. CORBIN, Attorney General of Arizona,

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RANDY GREENAWALT,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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SUMMARY OF ARGUMENT

In remanding to the district court, the Ninth Circuit took two very limited steps toward final resolution of the issues raised in this capital case. First, the Court of Appeals followed this Court's holding in Shea v. Louisiana, 470 U.S. _____, 105 S.Ct. 1065 (1985), by concluding that the rule announced in Edwards v. Arizona, 451 U.S. 477, 101 S.Ct. 1880 (1981), applies retroactively to a case pending on direct appeal at the time of the Edwards decision. Having made that decision, the Ninth Circuit then ordered a remand to the district court for a "thorough and reasoned application of Edwards to the facts of this case." Greenawalt v. Ricketts, 784 F.2d 1453, 1457 (9th Cir. 1986).

As discussed below, this Court should deny the certiorari petition because the Ninth Circuit's decision narrowly applies a noncontroversial rule of existing law, and because the substantive legal issues posed in the State's petition are not ripe for review.

I. GRANTING THE WRIT IS INAPPROPRIATE BECAUSE THE OPINION BELOW CONSTRUED EXISTING LAW CORRECTLY, CREATED NO "NEW" LAW AND WILL BE OF MINIMAL RELEVANCE TO ANY FUTURE COURT PROCEEDING.

Petitioners characterize the opinion below as "misconceived" and suggest that issuance of a published opinion was "especially pernicious" and created a "potential for far-flung error." (Petition at 25-26.) Such claims are unfounded. One need only consider the narrow scope of the actual holding below,

and the limited guidance it could offer any court in the future, to conclude that this case does not merit certiorari.

Most fundamentally, the Court of Appeals did not create any new legal principle, broaden or narrow the scope of any existing principle or erroneously construe any opinion of this Court. What the Court of Appeals held, and all it held, was that Edwards was temporally applicable to Greenawalt's case. In doing so the Ninth Circuit merely followed, almost ministerially, the directive of this Court as announced in Shea v. Louisiana. The Court of Appeals, performing the essence of its appellate function, simply corrected an erroneous conclusion the district court had reached without the benefit of this Court's intervening Shea decision.

It is difficult to see what future guidance other courts could derive from the opinion below. The Court of Appeals reiterated and applied the holding of Shea and expressly refused to reach any other substantive legal issue. Perhaps some future habeas corpus petitioner could cite the opinion below to demonstrate the retroactivity of Edwards, but that is hardly "pernicious" and, in any event, it is far more likely that he or she would simply cite Shea. As time passes, the retroactivity issue will fade into irrelevance, as will the opinion below.

This case does not implicate any of the considerations governing the grant of certiorari as expressed in Rule 17. The Ninth Circuit's decision does not conflict with a decision of another Court of Appeals or a state court of last resort.

Certainly the Court of Appeals did not so far depart from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's supervision. Finally, petitioners cannot seriously suggest that in applying Shea the Court of Appeals erroneously decided an "important question of federal law" or that such an issue requires decision by this Court.

II. THE SUBSTANTIVE LEGAL ISSUES ARE NOT RIPE FOR REVIEW AND, AS A RESULT, ISSUANCE OF THE WRIT WOULD BE INEFFICIENT AND WOULD CREATE PRACTICAL PROCEDURAL PROBLEMS.

The Court of Appeals found Edwards to be temporally applicable but expressly refused to address any other issue. Nonetheless, petitioners now present two of these previously unconsidered issues as the basis for seeking review by this Court.

First, petitioners claim that Edwards does not apply to this case because Greenawalt was not "interrogated." Throughout seven years of litigation it was so obvious that Greenawalt had been interrogated that the State never even raised the issue. Everyone just assumed that Greenawalt was interrogated when Detective Brawley awakened him, told him he had come to ask some questions and read him his rights. Petitioners did not argue the issue in the district court. Only after this Court issued its decision in Shea did petitioners feel compelled to present the issue to the Ninth Circuit.

This argument plainly is not yet ripe for review. The district court did not dispose of the issue because it was not

raised. Similarly, the Ninth Circuit's decision does not address the argument. The Court of Appeals merely held that the Edwards rule applied temporally because Greenawalt's case was pending on direct appeal at the time Edwards was decided. The court had no reason to dispose of the interrogation issue since the district court had never ruled on the matter. Instead, the Ninth Circuit remanded to the district court for a "thorough and reasoned application of Edwards." On remand, petitioners will have the opportunity to argue that there was no interrogation, just as Greenawalt will be able to argue that this contention is frivolous and was waived years ago.

Second, petitioners claim that Greenawalt's short consultation with his lawyer through a small hole in his cell door satisfied the requirements of Edwards. Except in dictum, the district court had no reason to focus on this issue because it had concluded, wrongly as shown later by Shea, that Edwards did not apply retroactively. In footnote 2 of its opinion the Court of Appeals stated that it expressed "no opinion regarding the merits of this argument." Petitioners offer no explanation why this Court should now step in and rule on an issue not yet decided by the lower courts.

Petitioners claim that the Court of Appeals misstated the factual record concerning the circumstances surrounding this conversation between Greenawalt and his counsel. Similarly, they contend that certain evidence of these facts was not properly preserved in the record. This confusion in the record, if any,

will not be resolved by issuance of a certiorari petition and merely confirms the need for a remand. As this court noted long ago in United States v. Johnston, 268 U.S. 220, 227, 45 S.Ct. 496 (1925), "We do not grant a certiorari to review evidence and discuss specific facts."

The Court of Appeals remanded for a "thorough and reasoned application of Edwards to the facts of this case." Upon remand the district court will have the opportunity to address all relevant factual and legal issues. The court will be able to settle the factual record, by hearing additional evidence if necessary. With respect to legal issues, the court will have the chance to consider petitioners' interrogation argument and to decide whether Greenawalt's brief consultation with his attorney satisfied Edwards. Thus, each of petitioners' current areas of concern can be considered in the ordinary course and a proper record can be established. In light of the Ninth Circuit's remand order, this case is not ripe for review by this Court. See Brotherhood of Locomotive Firemen & Enginemen v. Bangor & Aroostook Railroad Co., 389 U.S. 327, 88 S.Ct. 437 (1967).

CONCLUSION

The Ninth Circuit limited its holding to the interpretation of Shea v. Louisiana. In framing their reasons why the petition should be granted, petitioners do not challenge that narrow holding. Instead, they rely entirely upon issues that

were not even decided below. Under these circumstances, Greenawalt urges the Court to deny the petition.

RESPECTFULLY SUBMITTED this 18th day of September, 1986.

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G-6.13

CERTIFICATE OF SERVICE

I, CURTIS ULLMAN, duly sworn upon my oath, hereby affirm pursuant to Rule 28 that on September 18th, 1986, I caused the original and nine copies of the foregoing Brief in Opposition to be timely placed in the United States mail, first class postage prepaid, addressed to the Clerk of the Court and three copies to be mailed in the same fashion addressed as follows:

Bruce M. Ferg
Asst. Attorney General
315 State Government Bldg.
402 West Congress
Tucson, Arizona 85701-1367

Curtis Ullman

SUBSCRIBED AND SWORN to before me by Curtis Ullman this 18th day of September, 1986.

Melinda Halsey
Notary Public

My commission expires:

My Commission Expires 10